U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 14 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner describes itself as a software development company. It seeks to permanently employ the beneficiary in the United States a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 12, 2011. *See* 8 C.F.R. § 204.5(d).

The director's decision concludes that the instant petition was not filed with a valid labor certification because it expired before the petition was filed.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The regulation at 20 C.F.R. § 656.30(b)(1) provides: "An approved permanent labor certification *granted on or after July 16, 2007* ***expires*** *if not filed in support of a Form I–140 petition with the Department of Homeland Security within* ***180 calendar days*** of the date the Department of Labor granted the certification." (Emphasis added).

The petition was filed on May 23, 2013 with a labor certification approved by the U.S. Department of Labor (DOL) on September 27, 2011 and valid until March 25, 2012. Nearly 14 months passed after the expiration of the labor certification's validity date and prior to the filing of the instant petition with United States Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days of the labor certification's expiration, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

On appeal, counsel states that the petitioner's former counsel[3] filed the initial Form I-140 without the petitioner's consent and incorrectly mailed it to the Texas Service Center instead of the Nebraska

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] The record reflects that the petitioner was represented by former counsel, Any appeal or motion based upon a claim of ineffective assistance of counsel requires the following:

Service Center. According to USCIS records, the petitioner, through prior counsel, first submitted the initial Form I-140 to USCIS on May 23, 2012, almost two months after the expiration of the labor certification's validity date, which the Texas Service Center rejected. Therefore, even if the initial petition had been filed at the correct service center, it would have been rejected because the labor certification was expired at the time of filing. 8 C.F.R. § 204.5(k)(4).

At issue, therefore, is whether the instant Form I-140 should have been adjudicated by USCIS, despite being filed after the labor certification expired, due to the alleged failure of prior counsel to properly file the Form I-140. As stated above, the regulation at 20 C.F.R. § 656.30(b)(1) provides: "An approved permanent labor certification *granted on or after July 16, 2007* ***expires*** *if not filed in support of a Form I–140 petition with the Department of Homeland Security within* ***180 calendar days*** of the date the Department of Labor granted the certification." (Emphasis added). Counsel cites no support in regulation or precedent for the assertion that a counsel's failure to file the Form I-140 within the validity period of the labor certification allows the USCIS to disregard this validity period. Additionally, counsel fails to explain the basis for the substantial delay between the labor certification's expiration, the petitioner's discovery of prior counsel's failure to file the Form I-140, and the resubmission of the instant [expired] labor certification over one year after its expiration.

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also*

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(1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
(2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and
(3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record contains a letter, dated June 4, 2012, from the petitioner which outlines the details of Mr. alleged deficiencies in representing the petitioner. However, the record does not reflect whether a disciplinary complaint has been filed regarding his representation in this matter. The record reflects that a "Notice of Disciplinary Charges" was filed against but this was for allegedly depositing or commingling funds belonging to a client in a trust account. Therefore, the petitioner has not fully established a claim of ineffective assistance of counsel under *Matter of Lozada*. Even if the petitioner were to meet the *Lozada* requirements, counsel has not provided any regulatory or precedent support for the assertion that establishing a claim of ineffective assistance of counsel would allow USCIS to adjudicate a Form I-140 filed outside the validity period of the labor certification.

8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision.

ORDER: The appeal is rejected.